IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 249

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I.

In paragraph III (p. 24 *et seq.*), of its brief, defendant argues that the record does not show that plaintiff in error had a Missouri license to sell liquors, and therefore he can not recover in this case. This point is without merit, for the following reasons, amongst others:

1. Non-compliance with a license law is a matter of defense to be pleaded in bar (United Shoe Machinery Co. vs. Ramlose, 210 Mo., 631, 649 *et seq.*). No such issue was made in defendant's answer (Transcript, p. 10). No evidence was offered tending to show that plaintiff was not duly licensed. On the contrary it was admitted that the goods were shipped "in accordance with bona fide orders," and that until February 12, 1907, the date of passage of the Texas statute, the defendant stood ready and was willing to deliver to all consignees who might call and pay the proper charges on the liquor shipped (Transcript, p. 15). The point was not raised or considered in the Missouri Supreme Court.

2. The State of Missouri has no more right than the State of Texas to interfere with interstate commerce by the imposition of license fees affecting such commerce.

3. The Missouri statutes were intended to apply to local and not interstate transactions (Osborne vs. Florida, 164 U. S., 650, 653, 654; Kehrer vs. Stewart, 197 U. S., 60, 65).

4 Defendant has no right to question the validity of a contract of sale between plaintiff and his consignees.

II.

In paragraph V (p. 32, *et seq.*) of its brief, defendant argues that plaintiff's cause of action is for breach of contract and not in conversion. This point is answered by the authorities cited (p. 6) in the brief and argument of plaintiff in error in opposi-

tion to the motion of defendant in error to dismiss writ of error herein, and it has been decided against defendant in the overruling of that motion.

Respectfully submitted,

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A. F. SMITH,
Attorneys for Plaintiff in Error.

No. 749.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

vs.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

J. L. MINNIS,
I. N. WATSON,
Attorneys for Defendant in Error.

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CITATIONS.

No. 249.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

This is a suit in conversion. In 1907, plaintiff in error was engaged in business in Kansas City, Missouri, as a liquor dealer. He conducted his business by taking orders from different persons residing in different states, for one gallon of liquor and would ship the same "C. O. D." in one-gallon packages to the parties ordering the same. During the period commencing January 12th, 1907, and ending February 11th, 1907, inclusive, the plaintiff in error delivered to the defendant in error for shipment "C. O. D." to certain points in Texas certain packages described in his petition each containing one gallon of intoxicating liquors, which the plaintiff in error claims the defendant in error has converted to its own use and he is seeking to recover the value thereof in this action.

The petition sets out each shipment, the date thereof, the consignee thereof, the quantity of liquor shipped and the value thereof, but the itemized statement is not set forth in this record. There was no contention about the correctness of the statement of the account or the value of the liquor in controversy in this ac-

tion. This transcript of record is very incomplete, but the Supreme Court of the State of Missouri had the entire record before it when that court handed down the opinion in this case, and, after reviewing the record lodged in that court, expressed its conclusion of what the record showed in the following language (See Transcript of Record, 33):

> "And no fair-minded, disinterested man can read this record without reaching the conclusion that the "C. O. D." contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof; and in order to meet this evil the Statute of 1907 was by the legislature of that state enacted, and not for the purpose of interfering with state or interstate commerce."

The abstract of the record filed in the Supreme Court of Missouri showed that the plaintiff in error sent all liquor in controversy to persons residing in the State of Texas, and that the shipments arrived in the regular course of business at the points of destination, and that the defendant in error at all the times mentioned sent written notice, properly stamped and addressed, to all consignees of the arrival of said packages of liquor, so consigned to them (See Transcript of Record, 15). The record, also, shows that up to February 12th, 1907, the defendant in error, by its local agents at all points of destination in Texas, was ready and willing to deliver such intoxicating liquor to all consignees who called at the destination office of defendant in error and paid or offered to pay or tendered the proper "C. O. D." charges thereof.

The contract, under which these liquors were shipped, is found in the transcript of record, page 18, 19 and 20. The third paragraph of this contract provided that the company should not be liable for loss, damage or delay "by the act of God * * *, by restraints of Government," etc. The contract further provided, in paragraph 5, that the express company was "not to be held liable or responsible for any loss of, or damage, to, said property or any part thereof from any cause whatever, unless in every case the said loss or damage be proved to have occurred from fraud or gross negligence of said Company or its servants." Paragraph 6 of said contract provided as follows:

> "If any sum of money beside the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid, or if in any

case the consignee cannot be found or refuses to receive such property, *or for any other reason it cannot be delivered,* the shipper agrees that this Company may return said property to him subject to the conditions of this receipt and that he will pay all charges for transportation, and that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of a Warehouseman only."

And, by paragraph 9, the contract provided that "in consideration of the rate of freight to be charged, that the Pacific Express Company shall not be required to make free delivery of the property above mentioned, to the consignee at any station where no voluntary free delivery service is maintained by said Company." The tariff filed with the Interstate Commerce Commission, and in force at the times the shipments sued for were made, provided that "each return shipment 'C. O. D.' must be charged the same amount as was charged for the outward shipment, except that when two or more shipments are ordered back by the same shipper, from the same place, at the same time, such return packages may be aggregated as provided in Rule 7" (Abstract, 23). The tariff, also, provided:

> "If 'C. O. D.' matter is refused or cannot be delivered within 24 hours, the shipper must be immediately notified, and if not disposed of within thirty days of such notice, it may be returned subject to charges both ways. If the shipper, after receiving notice of non-delivery from destination agent, requests that the shipment be held for a further period, it may be granted, but it must not be held longer than 60 days after date of shipment, and forwarding agents are forbidden to make any agreement with shippers to hold the goods for a longer period."

The tariff, also, provided that "the shipper may order packages returned in a less period than thirty days," and that "C. O. D. packages that have been forwarded from one point to another, on order of shipper may be held for thirty days from date of reshipment" (Abstract of Record, 22).

On February 12, 1907, the legislature of the State of Texas passed an act imposing an occupation tax on persons, firms or corporations handling liquors C. O. D. This law is set out in abstract of the record, page 23. This law took effect immediately after its passage, on the 12th day of February, 1907. The defendant in error at once notified its agents to make no C.

O. D. deliveries at any point in the State of Texas. The license fee charged for each office in the State of Texas was $5,000 to the state and any county or any incorporated city or town was authorized to levy one-half the amount levied by the state, thus making the annual license tax $10,000 for each office where liquors were delivered in C. O. D. packages. The record in the Supreme Court of the State of Missouri shows the number of offices in the State of Texas maintained by defendant in error where intoxicating liquors shipped C. O. D. were delivered. The amount required to be paid as such license tax for all the offices in the State of Texas would be largely in excess of the entire revenue from all business done in the State of Texas. Upon the passage of this law, the defendant in error notified plaintiff in error that it would make no more C. O. D. deliveries of intoxicating liquors, but that it was willing to deliver the packages without collecting the purchase price, but plaintiff in error refused such offer and insisted on the defendant in error carrying out its contract of shipment and delivering the packages to the consignee and that it collect C. O. D. charges, which it refused to do. Defendant in error thereupon ordered its agents to return all liquors to Kansas City and it charged for such return under the provisions of its tariff heretofore quoted. All liquors were returned to Kansas City and tendered to the plaintiff in error and return charges demanded, but he refused to pay such charges and to accept such goods, and the defendant held the same for the use of the plaintiff, thereupon plaintiff brought this suit in conversion. There was no evidence offered to show that any of the consignees mentioned in the petition would have called and paid the purchase price and accepted the liquors.

The agreed statement of facts, states that after February 12th, if "any of the consignees of said liquor mentioned in plaintiff's petition, had called at the proper office of defendant and had tendered the defendant the proper C. O. D. charges on the liquor shipped to him and had offered to accept the same, delivery thereof C. O. D. would have been refused by defendant." There was no evidence offered to show that any consignee ever called after February 12th, 1907, and offered to pay the C. O. D. charges and receive the package of liquor (Transcript of Record, Page 15). The trial court rendered judgment for plaintiff in error, and in due time defendant in error prosecuted an appeal to the Supreme Court of Missouri, where the appeal was heard and the judgment of the trial court was reversed. Thereupon plaintiff in error sued out this writ of error from this court and the case was brought to this court and there is no assignment of error to the ruling of the Supreme Court of Missouri that conversion would not lie under the facts disclosed in this record.

BRIEF AND ARGUMENT.

I.

The judgment of the Supreme Court of Missouri, reversing the judgment of the trial court was based upon two propositions: First, that the statute of Texas offered in evidence was a valid exercise of the police power and constituted a justification for the refusal of defendant in error to collect the C. O. D. charges; Second, because the undisputed evidence shows that if the defendant in error was liable to the plaintiff in error in any manner it was for a breach of the C. O. D. contract and not for a conversion of the goods.

Plaintiff in error contends that the Supreme Court of Missouri erred in holding that the statute of Texas, February 12th, 1907, was a valid exercise of the police power of the state insofar as it affected, applied to, or controlled interstate C. O. D. shipments of original packages of liquor shipped from the State of Missouri to the State of Texas, and that the statute was in violation of the provision of the Constitution vesting in Congress the exclusive jurisdiction and control of interstate commerce. There is no assignment of error challenging the correctness of the ruling of the Supreme Court of Missouri on the second contention, to-wit, that if plaintiff in error had any right of action it was for violation of its contract in refusing to collect the purchase price of the liquor shipped by plaintiff in error and not an action for conversion. So that the only assignment of error before this court is whether or not the Texas statute was a valid exercise of the police power of the state, as applied to these C. O. D. shipments of intoxicating liquors. The Supreme Court of Missouri speaking of the record in this case in the said court say: "No fair-minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of laws thereof; and in order to meet this evil the statute of 1907 was by the legislature of that state enacted, and not for the purpose of interfering with state or interstate commerce" (See Transcript of Record, page 33). This record shows that the defendant in error was willing at all times to deliver these pack-

ages of liquor to the consignees if plaintiff in error would release it from collecting the C. O. D. charges. It, also, offered to hold the liquor a sufficient length of time to enable the plaintiff in error to make arrangements through other agencies to collect the purchase price of the liquor shipped. These offers were refused by the plaintiff in error. Thereupon, the defendant in error returned the packages to plaintiff in error, as provided by its contract and its tariff on file with the Interstate Commerce Commission (See Transcript of Record, pages 19 and 22). Plaintiff in error refused to accept the return of these packages of liquor, but stated that he would have accepted them if they had been delivered to him free of charge and that he requested the return of these shipments free of charge (See Transcript of Record, page 21).

II.

While intoxicating liquors are recognized as a legitimate subject of interstate commerce, yet such liquors do not have the same rights which attach to the shipments of other commodities.

In the case of *Crowley* v. *Christensen*, 137 U. S. l. c. 91, this court said:

> "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right

in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."

In the case of *Delamater* v. *South Dakota*, 205 U. S. 93, this court passed upon the right of South Dakota to regulate or prohibit the business of soliciting orders from residents of that state for the purchase of intoxicating liquors in quantities less than five gallons from a firm in St. Paul, Minnesota. The plaintiff in error in that case solicited orders in the form of proposals to buy, and when accepted by his principal the liquors were shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days credit. At the time Delamater engaged in the business just stated, in South Dakota, the law of that state imposed an annual license charge upon the business of selling or offering for sale intoxicating liquors within the state by any travelling salesman who solicits orders by the jug or bottle in lots less than five gallons. A violation of the statute was made a misdemeanor punishable by fine or imprisonment or both in the discretion of the court. Delamater, not having paid the license charged, was prosecuted under the statute. He claimed that if the statute applied it was void because repugnant to the commerce clause of the Constitution of the United States. In passing upon the validity of this South Dakota statute, this court said:

"All the assignments of error involve the proposition that the state statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act, 26 Stat. L. 313, chap. 728. For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin, because they concerned only the power of a State to deal with articles of interstate commerce other than intox-

icating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

And, again in the same case:

"It having been thus settled that under the Wilson act a resident of one state had the right to contract for liquors in another State and receive the liquors in the State of his residence for his own use, therefore, it is insisted the agent or traveling salesman of a non-resident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that state orders for liquor to be consummated by acceptance of the proposals by the non-resident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a State to prevent a resident from ordering from another State liquor for his own use and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court. That a state may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. *Hooper* v. *California*, 155 U. S. 648. But that this power to prohibit does not extend to preventing a citizen of one state from making a contract of insurance in another state is also settled."

After reciting extracts from *Nutting* v. *Massachusetts*, 183 U. S. 553; 175 Mass. 156, this court then say:

"As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state into another after delivery and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not

have thought of making,' must be as complete and efficacious as is such authority in relation to contracts on insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

We submit that if a state has the authority to prohibit agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors, then the state would certainly have authority to prohibit an agent acting in said state from collecting the purchase price of any liquor shipped into the state. It seems to us that the exercise of the power of the state in either instance would have the same effect upon interstate commerce. And this distinction has been recognized by the statute passed by Congress March 4, 1909, and known as Section 239 of the Criminal Code. This section provides:

"Sec. 239. Common Carriers, etc., not to collect purchase price of interstate shipments of intoxicating liquors.

Any railroad company, express company or other common carrier or any other person *who, in connection with the transportation of any spirits*, wines, malted, fermented or any other intoxicating liquor of any kind from one state, etc., into another state, etc., shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, save only in the actual transportation and delivery of the same, shall be fined not more than $5,000.00." (Italics ours).

Congress has defined what it meant by the term "transportation" in Interstate Commerce Act. (See Interstate Commerce Act Sec. 1, *Pennsylvania Railroad Co. v. United States*, 236 U. S. (1. c.) 362.

Congress by this act of 1909 expressly recognizes the fact that the collection of the purchase money is no part of the transportation and delivery of liquors enjoined by the Interstate Commerce Act or the Wilson Act. This section does not prohibit the transportation of intoxicating liquors as that term is used in the Interstate Commerce Act and the Wilson Act. (See Sec. 1, Interstate Commerce Act.) It is now perfectly legitimate under the act of 1909 for the Express Company to *transport* and *deliver* intoxicating

liquors, but it must not collect the purchase price. The act of Congress of 1909 does not refer in any way or manner to the act known as the Wilson Act, or the act known as the Interstate Commerce Act. It does not affect a straight consignment of liquor.

It does not purport to modify, alter or repeal the Wilson Act, neither does it change or modify the scope of the term "transportation" as used in the Interstate Commerce Act, and the rule is well established by numerous decisions of this court and other courts that "When there are two acts upon the same subject the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of repugnancy as a repeal of the first." *United States* v. *Tynen*, 11 Wallace, l. c. 92; *Henrietta Mining & Milling Co.* v. *Gardner*, 173 U. S. l. c. 128. There is no repugnancy in the provisions of these three acts so far as the same have been construed by this court. So that it is very apparent that Congress in passing Sec. 239 of the Criminal Code above mentioned did not intend to change or restrict the provisions of the Wilson Act, or Section 1 of the Interstate Commerce Act. In other words, Congress left *transportation* of intoxicating liquors subject to the provisions of the Wilson Act without any change whatever. Whatever was a legitimate part of *transportation* of intoxicating liquors before the passage of Section 239 remained a legitimate part of such transportation after the passage of said act, and whatever was legitimate "*transportation*" of intoxicating liquors under the Interstate Commerce Act before the passage of the Act of 1909, *supra* was legitimate transportation after the passage of said act. Said act uses the term "Who, in connection with the *transportation*" thus indicating that while collecting C. O. D. charges was connected with the transportation of intoxicating liquors, Congress did not consider it was a part of such transportation, and that "transportation" of intoxicating liquors could be continued just the same but the C. O. D. practice was prohibited. Congress attempted to correct an evil that had grown up with and attached itself to interstate transportation of intoxicating liquors, and Congress evidently did not intend to limit or change the meaning given to the term "transportation" in the previous acts but it did consider that this C. O. D. service was separate and distinct from "transportation" and no part thereof as that term is defined in Section 1 of the Interstate Commerce Act.

Congress evidently considered that it was no part of the duty of a common carrier under the law to collect the purchase price of intoxicating liquors transported in Interstate Commerce.

The general rule of law announced by text writers and various courts of last resort, was that such duty was not enjoined by law upon a common carrier. In Hutchinson on Carriers, 3 Ed. Section 726, it is said:

> "The carrier who accepts goods with such instructions undertakes that they shall not be delivered unless the condition of payment be complied with, and *becomes the agent of the shipper of the goods to receive such payments.* He therefore undertakes, *in addition to his duties as carrier,* to collect for the consignor the price of his goods" (italics our own).

In Section 728, the same author says:

> "The obligation to require payment for the goods as a condition of their delivery, does not arise from *the implied duty of the carrier. It must rest upon contract, either express or implied, from the circumstances*" (italics our own).

In *U. S. Express Co.* v. *Keifer*, 59 Ind. 263, it is said:

> "Where the goods are marked C. O. D., the contract of the common carrier, in connection therewith, is not only for the safe carriage and delivery of the goods to the consignee, but he further contracts with the consignor that he will 'collect on delivery' and return to the consignor the charges on said goods."

And by Section 729 of Hutchinson on Carriers, it is said:

> "When the carrier receives goods with such instructions, and carries them to their destination, if the consignee is not ready to pay for them immediately upon their being tendered to him, he must retain them a reasonable time to enable the consignee to obtain the means to do so."

In Elliott on Railroads, Vol. 4, Section 1530, it is said:

> "The common carrier is not obliged to collect or require the payment of the purchase price of goods offered to it for *transportation* before delivering them to the purchaser under its common law duties" (italics our own).

In A. & E. Encyclopedia of Law, 2 Ed. Vol. 12, page 533, it is said:

> "There is no common law liability devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by *contract, express or implied.*"

In *Cox et al.* v. *Rd. Co.*, 91 Ala. 392, 8 Sou. 824, it is held:

"From his mere avocation, or the nature of his business, no implied obligation or duty devolves upon a common carrier to require the payment of goods transported by him as a condition for their delivery. *Such obligation arises only by contract, express or implied.*"

And, in *Express Co.* v. *Commonwealth*, 29 Ky. Law Rep. 524, it is said:

"*There is no common law duty devolving upon a common carrier to act as a collecting agent for the consignor. That is a matter of private contract and one which the carrier may enter into or refuse at its option.* When it does make such a contract, it stands with reference to it just as any other agent."

In Moore on Carriers, Section 31, it is said:

"Where goods are sent, with instructions not to deliver them until they are paid for, the carrier, who accepts the goods with such instructions, undertakes not to deliver them unless the condition of payment is complied with. *In addition to its obligation as a carrier, it becomes the agent of the consignor to collect and receive the price of the goods and return the money to the consignor. This obligation or duty is not one arising or implied from the nature of its business, but it is based on contract, express or implied.*"

In Hale on Bailments and Carriers, page 451, it is said:

"When goods are received by a carrier for transportation, the C. O. D. contract of the carrier in connection therewith is not only for the safe carriage and delivery of their goods, to the consignee, but there is a further agreement to 'collect on delivery' and return to the consignor the amount so received. *The common law places no obligation on a common carrier to do C. O. D. business. Such obligations are assumed only by contract.*"

In *McNichol* v. *Express Co.*, 12 Mo. App. 401, it is said:

"*So far as we know, there is no common law duty upon the carrier to act as collecting agent for the shipper. The law does not attach any peculiar liability to such office when it assumes it such as attaches to its office of public carrier.* When he undertakes such duty, his liability is the same as a bank, attorney at law, or any other collecting agent, and it arises upon the special contract by which he undertakes the duty and not upon the ancient custom which is the foundation of his peculiar liability as a carrier."

And in *Fowler Commission Co.* v. *Rd.*, 98 Mo. App. 210, in speaking of C. O. D. shipments, it is said:

> *"In the former instance, there is no common law liability to become the shipper's agent to collect the purchase money, and he is only liable by reason of a breach of an implied contract that he will collect before delivery.* Hutchinson on Carriers' Section 391. In the latter case, the liability arises from a breach of a duty to safely ship and deliver."

In the case of *Danciger* v. *Pacific Express Co. and Wells Fargo & Co.*, 154 Fed. 379, the plaintiffs in that case asked for a mandatory injunction compelling these appellants to accept and carry liquor C. O. D. These appellants contended that it was no part of their duty as common carriers to accept such shipments and it was therefore no part of interstate commerce to accept and carry commodities C. O. D. In that case, it was held as a general rule of law that a carrier can only be compelled to perform a duty imposed on it by law, and that there is no common law duty resting upon the carrier to carry C. O. D. shipments. And this was so under the Interstate Commerce Act. In this case, it is said:

> "Does the law compel the defendants to perform the services demanded by complainants? It must be observed the defendants have not denied, and do not now deny, *the right of complainants to require them to carry interstate shipments of intoxicating liquors to any point reached by the defendants' lines, whether such points be within states where the sale of intoxicating liquors is prohibited or not. The sole question here raised is the right of the complainants to insist on the defendants carrying their C. O. D. shipments of liquor on complaints tendering or paying the lawful charges demanded by defendants. Is such duty imposed upon the defendant by the law?"* (Italics our own.)

And the court, after quoting a number of decisions, says:

> "Laying aside the briefs presented in this case, and regarding the questions presented in their legal aspect alone, I am so strongly inclined to the opinion that the ultimate holding in the case on final decree must be that the rights complained of by complainants and here sought to be enforced are *not obligations imposed on the defendants at law, but such matters as rest in contract and, being such, the defendants may undertake the performance of the service for complainants or not as they deem fit, etc."*

Congress recognized that it was a well established rule that it was no part of the duty imposed by law upon appellant as a common carrier to collect the purchase price of goods transported in interstate commerce; that, in collecting the purchase price, the carrier was acting simply as the agent of the consignor.

What is legitimate interstate commerce, which is within the sole jurisdiction of congress and not subject to police power of the state, has been clearly stated by this court in the case of *Cooley v. Board of Port Wardens*, 12 Howard, 299, as follows:

> "Commerce with foreign countries and among the states, strictly considered, *consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of the commodity*. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country and the authority which can act for the whole country can alone adopt such system. Action upon it by separate states is not therefore permissible" (italics our own).

In the same case in speaking of the powers of congress to regulate commerce, this court also said:

> "Some of them are national in their character and admit uniformity of regulation affecting alike all the states; others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states, which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that, congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free."
>
> "The substance of the sale is the agreement to sell and its acceptance." *Norfolk & West. Ry. Co. v. Sims*, 191 U. S. (l. c.) 447. And in *Adams Express Co. v. Iowa*, 196 U. S. (l. c.) it is said, "While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The same doctrine is announced in *Rhodes* v. *Iowa*, 170, U. S. 412. In *Adams Express Co.* v. *Kentucky*, 206 U. S. 129 it was held that the sale took place in Ohio.

In *Kirmeyer* v. *Kansas*, 236 U. S. 568, the orders were received and accepted in Missouri, but the beer was delivered in Kansas, and the collections were usually made by the drivers and it was ruled that the sale was in Missouri, and the transaction constituted Interstate Commerce.

Hence the sale of these goods took place in Missouri and the transportation of same to Texas, which included delivery did not include collection of the purchase price, therefore the Act of 1909 did not prohibit such sales, nor such transportation, but congress did prohibit this practice of the collection of C. O. D. charges in connection with such sale and transportation. If the Act of Congress of March, 1909, did not prohibit the essential parts of a sale, and "transportation" as that term is defined in the above Acts of Congress, then the Statute of Texas did not interfere with these essential elements of Interstate Commerce in liquors, because it did not attempt to prohibit all sales and delivery of intoxicating liquors, but it only prohibited collection of the purchase price. This statute did not prohibit a sale of liquor in Missouri, and consigned to the purchaser in Texas where no part of the purchase price was collected. The law of Texas was in aid of legitimate transportation of intoxicating liquors as defined by Congress in the act above mentioned and not a prohibition of the transportation of liquors as that term is used in the Interstate Commerce Act. This law of Texas was not a regulation directly affecting interstate commerce in an essential and vital point. Under that law plaintiff in error could sell and transport liquors to his customers in Texas just the same as he can since the passage of the Act of Congress of 1909. These essential elements of interstate commerce are not affected by said law of Texas.

In the license cases, 5th Howard, 504-509, in speaking of the police power reserved to the states and its relation to the power granted to congress to regulate commerce between states, this court said:

> "The assumption is that the police power was not touched by the constitution, but left to the states, as the constitution found it. This is admitted; and whenever a thing, from character or condition is of a description to be regulated by that

power in the state, then the regulation may be made by the state and Congress cannot interfere. * * * And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of foreign commerce or of commerce among the states. * * * And as an incident to this power a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States."

In the case of *Railroad Company* v. *Husen*, 95 U. S. 465, this court said:

> "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, *it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self protection.*"

In the case of *Wabash, etc. Rd. Co.* v. *Illinois*, 118 U. S. 557, 572, this court said:

> "It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure. * * * And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation or any other restrictive regulation interfering with and seriously embarrassing this commerce."

In the case of *Bowman* v. *Ry. Co.*, 125 U. S. 465, this court held that a statute of Iowa, which prohibited the importation of intoxicating liquors into the state, was void, because the exclusive

power to regulate the transportation of intoxicating liquors in interstate commerce belonged to Congress. In passing upon the validity of this statute, this court said:

> "It is not an exercise of the jurisdiction of the state over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits and is designed as a regulation for the conduct of commerce before the merchandise is brought to its property. It is not one of those local regulations designed to aid and facilitate commerce. * * * It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. * * * It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject."

And, again, this court says:

> "The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the state is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation is terminated, because the sales which the state may prohibit are all things within its jurisdiction."

In the case of *Rhodes* v. *Iowa*, 170 U. S. 412, this court again passed upon a statute of Iowa regulating transportation of intoxicating liquors which was similar to the one involved in the Bowman case. After referring to the decision in the Bowman case, this court said (l. c. 415):

> "It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of said laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned."

In the case of *Heyman* v. *Southern Ry. Co.*, 203 U. S. l. c. 277, this court quoted the following language from the case of *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. 438:

> "If they (the goods) were still in the course of interstate transportation, the seizure by the constable was not even

prima facie legal, for the very law under which the seizure was made had, prior to such seizure, been declared by the Supreme Court of the United States to be unconstitutional in so far as it interfered with interstate commerce. *Scott* v. *Donald*, 165 U. S. 58. It, therefore, follows that if the shipment had not been completed at the time the goods were seized, the railroad company would have no right to defend on the ground that it submitted to the superior authority, granting that such a defense, if established, would relieve it from liability."

The foregoing authorities decide that the essential elements of interstate commerce, which are under the exclusive control of Congress, are "intercourse and traffic, including in these terms navigation and the transportation" of persons and property and the purchase, sale and exchange of commodities. The "transportation" of liquors, as used in the Interstate Commerce Act, and the Act of Congress of March 4th, 1909, does not include the duty of collecting the purchase price of articles transported in such commerce. Hence Congress evidently did not intend by this Act to prohibit Interstate Commerce in intoxicating liquors, as that term is defined in *Cooley* v. *Port Wardens, supra.* Congress expressly determined by this last act that the term "transportation" did not include services of collecting the purchase price, because it expressly provides that any common carrier *who in connection with the transportation of intoxicating liquors shall collect the purchase* price shall be guilty of a misdeameanor. Congress thereby put a construction on the Wilson Act and the Interstate Commerce Act, and declared that the collection of the purchase price of intoxicating liquors was no part of the *transportation* as that term is used in said acts. Taking the Act of Congress of March 4th, 1909, and the Interstate Commerce Act, and the Wilson Act, as those acts are construed by this court, it is clear that the legitimate transportation of intoxicating liquors protected by said acts is the transportation and delivery of such commodity to the consignee and that the collection of the purchase price was not a part of the transportation of such commodity. If we are right in this contention then the regulation or prohibition of such act did not belong to Congress exclusively, but in the absence of Congressional Legislation on that subject the states were free to act until Congress assumed control over such matter.

Northern Pac. Ry. v. *Washington*, 222 U. S. 370.

The act of the State of Texas in question does not prohibit the sale, transportation and delivery of intoxicating liquors into the State of Texas, but it only prohibits the defendant from acting as a collection agent for the collection of the C. O. D. charges. In shipping liquors C. O. D. the consignor simply puts a prohibition upon delivery, until certain money is paid, but there is a recognized difference between delivering intoxicating liquors and collecting the purchase price. This statute of Texas does not affect delivery of intoxicating liquors at any office where liquors are not shipped C. O. D. in interstate commerce to consignees residing in Texas. The defendant offered to make the delivery of these packages of liquor in controversy to the consignees if the plaintiff would waive the collection of the purchase price, which service the defendant assumed to render to the plaintiff by its special contract. It is clear from the foregoing acts of Congress and authorities herein cited, that the sale and transportation of intoxicating liquors can be carried on under the Texas Statute without interfering with legitimate Interstate Commerce as now permitted under said acts of Congress, and that the C. O. D. feature was not any service required by law, but was a duty assumed wholly by contract, and as it did not form a part of the sale and delivery of intoxicating liquors which the carrier was bound to render all shippers as provided for by law, the regulation of such a contractual duty was not under the exclusive jurisdiction of Congress. It was a proper subject for the state to regulate by its police power, and the State of Texas had a right to prohibit that part of the service which was assumed by the private contract between the parties. We submit that under the interstate commerce Act defendant in error had to perform the same services for all shippers under like circumstances and conditions, and it was only such duties as were enjoined on the carrier by law which constituted the exclusive jurisdiction of Congress over such commerce. But there was no provision in any of the acts of Congress aforesaid which made it the duty of carriers to accept and transport liquors C. O. D. and it was optional with the carrier whether or not it accepted such duty and obligation. And we submit that it was only such duties imposed by law that constituted Interstate Commerce in the sense that Congress had exclusive control thereof, and that the right to act as a collection agent for the shipper was not a part of such commerce over which Congress retained complete control. If not, then until such time as Congress did assume

complete control the states had a right to exercise the police power of the state.

See *N. P. Ry. Co.* v. *Washington, supra.*

In all the cases cited by the plaintiff in error, the statutes of the state prohibited the sale and transportation of liquor into the state, and the statutes did not pretend to regulate the conduct of any agent acting for the consignor within the state.

In the case of *State of Iowa,* v. *Rhodes, supra,* the act expressly prohibited the express company from transporting liquor into the state of Iowa. The Supreme Court in the Rhodes case reviews the former decision of this court in the case of *Bowman* v. *Railway Co.,* 125 U. S. 465, and in speaking of the statute of Iowa under which the Bowman case arose, this court said:

> "In other words the statute which was under review in the Bowman case provides, 'If any express company, railway company or any agent or person in the employ of any express company or of any common carrier, or if any other person shall knowingly bring within this state or transport or convey between points or from one place to another within the state' whilst the statute now provides exactly the same thing, except that the words 'knowingly bring within this state' are omitted. It is hence manifest that the present statute as interpreted by the Supreme Court of Iowa has exactly the significance it would have did it contain the words found in the exact review in the Bowman case."

And again this court say:

> "The fundamental right which the deci ion in the Bowman case held to be protected from the operation of state laws by the constitution of the United States was the continuity of the shipment of goods coming from one state into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. The protection of the constitution of the United States is plainly denied by the statute now under review as its provisions are interpreted by the court below. The power which it was held in the Bowman case the state did not possess was that of stopping interstate shipments at the state line by breaking their continuity and intercepting their course from the point of origin to the point of consignment."

In the case of *American Express Co.* v. *Iowa,* 196 U. S. 133, the express company had received at Rock Island, Illinois, four

boxes of merchandise to be carried to Tama, Iowa, and to be there delivered to four different persons, one package being consigned to each. The shipment was C. O. D. and the day the merchandise reached Tama it was seized in the hands of the express agent. This was based on an information before a justice of the peace charging that the packages contained intoxicating liquor held by the express company for sale. The court will observe that this procedure absolutely prohibited delivery of the goods to the consignee. The Supreme Court of Iowa had held that where merchandise was shipped C. O. D. the merchandise remained the property of the consignor and was held by the carrier as his agent without authority to complete the sale, and upon this premise it was decided that intoxicating liquors shipped C. O. D. from another state were subject to be seized on their arrival in Iowa in the hands of the express company. This was the question presented to this court for decision. This court cites the case of *Bowman* v. *Railway Co.*, 125 U. S. *Supra; Lesse* v. *Hardin*, 135 U. S. 100; *Thodes* v. *Iowa*, 170 Mo. *supra* and the case of *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. *Supra*. In passing upon the question as to when title passed and the sale was completed, this court said:

> "True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price and delivery to the consignee at the point of destination.
>
> But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so to fix by agreement the time when the condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state."

The court then quotes from the case of *Norfolk & Western Railway Co.* v. *Sims*, 191 U. S. 441, as follows:

"While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The Rhodes case therefore holds that the sale of liquors took place in the State of Illinois, and the fact that they were shipped C. O. D. did not change the rule of law that the sale took place where the order was accepted and that the seizure by the officers under the laws of Iowa would necessarily prohibit the transportation and delivery of the article, and hence the question involved in the case at bar was not decided by the above case.

In the case of *Adams* v. *Express Co.*, 206 U. S. 129, the law of Kentucky provided that all shipments of spirituous, vinous or malted liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where this act is in force shall be unlawful and shall be *deemed sales of such liquors* at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof. This court held that the express company could not be prosecuted for a violation of said statute. The court will observe that the Kentucky statute declared such shipments C. O. D. constituted a sale where the goods were delivered and made it a criminal offense for the carrier or its agents to make such deliveries. This statute completely foreclosed the right to sell and deliver any liquors sent C. O. D. in the State of Kentucky. The same is true in *Adams* v. *Kentucky*, 214 U. S. 218.

The case of *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, cited by plaintiff in error involved the construction of the Kentucky statute which made it unlawful for any common carrier to transport beer or any intoxicating liquors to any consignee in any locality within the state where the sale of such liquor had been prohibited by the local option law of the state. The railroad company notified its agents in and out of the state to refuse to receive liquor when consigned to any local option point. Suit was instituted by the Brewing Company to enjoin the railroad company from refusing to accept the products of the Brewing Company for transportation from Evansville, Indiana, to local option points in Kentucky. This court held that it was not com-

petent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another and that until such transportation is concluded by delivery to the consignee such commodities do not become subject to state regulation restraining their sale or disposition. It was ruled by this court that the statute of Kentucky as applied to interstate shipments was an illegal regulation of interstate commerce. It goes without saying that these cases do not reach the question involved in this case for the reason that in all such cases the state law in effect prohibited a sale and transportation of liquors from one state into another. But as we have tried to demonstrate in this brief, the Texas statute simply prohibits any agent in the State of Texas from collecting the purchase price of liquors shipped into that state. It prohibits a party from acting as agent of a non-resident liquor dealer in collecting the purchase price of his product and we contend is governed by the same principles as announced in the case of *Delamater* v. *South Dakota, supra.* The fact that the law of Texas prohibited an express company from acting as collecting agent in the State of Texas in the collection of the purchase price of the liquors, did not prohibit the sale and transportation of liquors into the State of Texas. These liquors were all transported after the provisions of Section 1 of the Interstate Commerce Act was in full force and effect, and the term "transportation" as defined in that act does not include the service of delivering goods shipped C. O. D., and the fact that Congress in 1909 used the term "transportation" without any limitation indicates that Congress used that term in the same sense it was used in the Interstate Commerce Act. If that was so, then Congress did not intend to limit legitimate interstate commerce in intoxicating liquors, but simply prohibited an evil that had grown up with and attached itself to such transportation, and if our position is correct in this respect then the State of Texas had a right to prohibit an evil practice which was being carried on under the guise of interstate commerce. It is not everything that is done in the shipment of merchandise in interstate commerce that is strictly interstate commerce as defined by this court. The practice of the express company acting as a collecting agent for shippers was an evil which Congress deemed should be corrected, but until Congress passed an act prohibiting such evil the states had a right to correct such an evil and such correction did not constitute an interference with legitimate interstate commerce.

III.

This record shows that the system used in selling intoxicating liquors by the plaintiff in error herein was a plain evasion of both the laws of the State of Texas and the State of Missouri. At the time the shipments in question were made by plaintiff in error, Section 7220 of Revised Statutes of Missouri, 1909, provided that "intoxicating liquors may be sold in any quantity not less than one gallon at the place where made but the maker or seller shall not permit or suffer the same to be drunk at the place of sale or at any place under the control of either or both." But plaintiff in error was not complying with this statute when he made the shipments in question. He testified as follows (see transcript of Record p. 16):

Q. Where do you reside?
A. Kansas City, Missouri.
Q. What business are you engaged in?
A. I am in the liquor business. *I am a distiller and a liquor dealer.*
Q. *Have you a distillery?*
A. *Yes, sir.*
Q. Where is your place of business?
A. *My distillery is at Liberty, Missouri. My place of business is at Kansas City, Missouri.*

The record in this case in the Supreme Court of Missouri shows that the plaintiff delivered the liquors in question to the defendant at Kansas City, Mo. They were therefore not sold at the place where made. This section has been construed by the Court of Appeals in the case of *City of Rich Hill* v. *Coleman*, 63 Mo. App. 615, in which it was held that the defendant in that case was rightfully convicted of selling liquors at his warehouse which was not the same place where his distillery was located. The defendant in that case was charged with selling one gallon of liquor in violation of Section 7220. It was admitted that the defendant before and at the time of the sale was a distiller of liquor and that his distillery was located about a mile and a half from the corporate limits of the said city; that he had an office and wareroom in the corporate limits of the said city, and that after taking liquor out of bond he removed it to said office and wareroom and used it as his place to do all his trading and shipping from in connection with his distillery and from which he did on

he day alleged in the complaint sell one gallon of liquor as alleged. n concluding its opinion the court say:

> "Can it be said with any show of reason that the defendant's office and wareroom in said city, where he made the sale, is identical with his distillery situated a mile and a half from the corporate limits of said city, where the liquor so sold was manufactured? The former is within, and the latter is without the corporate limits of said city—over the one place, the city has jurisdiction; over the other, it has not. We know of no rule of construction that would authorize us to hold that the place of sale was the same as that of the manufacture."

In the case of *State* v. *Heard*, 64 Mo. App. 334, the defendant as convicted of selling intoxicating liquors in less quantities than hree gallons without having a license as a dramshop keeper. The efense consisted in the fact that defendant was a distiller and hat the liquor was whiskey which he had made in his distillery nd sold as he contends, at the place where made. The facts were hat the defendant's distillery was at the foot of a steep hill and hat the house where he sold the liquor was at the top of this hill bout 270 feet (measured by stepping up the hill), away from the istillery, both the distillery and the house where the liquor was old being in one enclosure. The distillery, the house and the whole nclosure were in the sole possession and in the sole control of the efendant. The question involved in the case was whether the iquor was sold "at the place where made." The court, in answer o this question, under the facts, said:

> "The question, then, is, was the building where the liquor in question was sold the place where it was made, in the sense of the state statute aforesaid? We are of the opinion that it was."

And the court, in closing the opinion, says:

> "So, therefore, our interpretation of the statute is, that the liquor may be sold by the distiller at a place outside the distillery building, provided it is within the distillery premises. And we think the place shown in evidence was on such premises, when the location described is considered.
>
> This case is not like that of *Rich Hill* v. *Coleman*, decided this term. There the place of sale was wholly distinct and disconnected from the distillery."

In the case of *State* v. *Quinn*, 170 Mo. 176, the Supreme Court of Missouri affirmed the opinion of the St. Louis Court of Appeals in said cause and quoted the following language from said opinion, concerning the dramshop act:

> "The dramshop act is very broad. It provides that no person shall directly or indirectly sell intoxicating liquors in any quantity less than three gallons either at retail or in the original package without taking out a license as a dramshop keeper (Sec. 2994, R. S. 1899). A druggist may not sell in any quantity exceeding four gallons (Sec. 3047, R. S. 1899). A merchant may not sell less than five gallons (Sec. 8563, R. S. 1899)."

The only other provision of the statutes of the State of Missouri authorizing the sale of intoxicating liquors in gallon quantities was Section 7186, which defined a dramshop keeper and also provided the amount of liquor he could sell in a single sale. So far as this record shows the plaintiff could not claim a right to sell under any other statute than Section 7186 defining a dramship keeper. There is no evidence in this case showing plaintiff was a licensed dramshop keeper, but, assuming that he was, still we contend that it is a violation of the laws of the State of Missouri for the plaintiff to deliver intoxicating liquors in quantities of one gallon to a common carrier to be sent C. O. D. to various places in the several states. The whole scope and intent of the laws of Missouri relating to dramshop keepers is to require that the liquors shall be sold and delivered to the purchaser on the premises.

Section 7189 provides that no dramshop keeper shall keep a dramshop at more than one place at the same time, nor shall the license of the dramshop keeper be assignable or transferable, and all sales made by him on credit are declared void and of no effect, and the debt thereby attempted to be created shall not be recoverable at law.

Section 7191, Revised Statutes of Missouri, 1909, provides that the application for license of dramshop keeper shall state *specifically* where the dramshop is to be kept.

Section 7196 requires the dramshop keeper to give a bond conditioned that he shall keep at all times an orderly house, "and that he will not sell, give away or otherwise dispose of, or suffer the same *to be done about his premises*, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any provisions of this article, etc."

Section 7213 makes it a penalty for every dramshop keeper "who shall sell, give away or otherwise dispose of or suffer the same to be done about his *premises*, any intoxicating liquor in any quantity to any minor, or who shall have any minor in his employ about his dramshop to play cards, dominoes, billiards, etc."

Section 7215, prohibits any dramshop keeper from selling intoxicating liquor to any person who is an habitual drunkard.

Section 7216, prohibits any person from keeping open such dramshops or selling, giving away or otherwise disposing of, or suffering the same to be done, about or on his *premises* any intoxicating liquor in any quantity upon the first day of the week, commonly called Sunday, or upon a day of a general election, etc.

Section 7219 prohibits the county clerk from granting a license to any dramshop keeper who has sold, given away or otherwise disposed of any intoxicating liquor above mentioned, etc.

Section 7220 provides that intoxicating liquor may be sold in any quantity, not less than one gallon, at the place where made, but the maker or seller shall not permit nor suffer the same to be drunk at the place of sale nor at any place under the control of the seller.

Section 7221 provides that this article shall not be construed so as to affect the right of the merchant to sell intoxicating liquor according to the provisions of the law regulating the licensing and taxation of the merchant, nor as affecting the right of wine growers to sell wine of their own production in any quantity on their own premises.

Section 7223 prohibits any dramshop keeper, druggist or merchant from selling, giving away or otherwise disposing of, or suffering the same to be done about his *premises*, any intoxicating liquors to any habitual drunkard, etc.

In the case of *State* v. *Hughes*, 24 Mo. 147, it was ruled that a license to sell liquor at a specified block in the City of St. Louis did not authorize a sale in another block in said city.

All the foregoing provisions and decisions of the courts of the State of Missouri require the dramshop keeper to sell on his premises and not elsewhere. If it is unlawful in the State of Missouri for the dramshop keeper to sell or deliver liquor in quantities of one gallon at places outside of his premises, as ruled in *State* v. *Hughes*, *supra*, then it would be unlawful to have a common carrier make such a delivery. A similar ruling to the Hughes case has been made in the case of *Panner* v. *Bugg*, 74 Mo. App. 196.

In the case of *St. Louis* v. *Tielkemeyer*, 226 Mo. l. c. 143, the court say:

> "Section 2990, Revised Statutes 1899, Ann. Stat. 1906, p. 1714, defines the term dramshop keeper as follows: 'The dramshop keeper is a person permitted by law, paying a license according to the provisions of this chapter, to sell intoxicating liquors in any quantity, either at retail or in original packages, not exceeding ten gallons.' Section 2991 says, 'No person shall directly or indirectly sell intoxicating liquors in any quantity less than three gallons either at retail or in the original package without taking out a license as a dramshop keeper.' The word dramshop keeper has a wider meaning in its general significance than that given in the statute, but the statute by its definition restricts the meaning of the word to its own purposes."

The foregoing authorities decide that under the statutes of the State of Missouri, the plaintiff had no right to sell liquor in less than three gallon packages, except under the license given him as a dramshop keeper, and we submit that under the restricted meaning of a dramshop keeper and the restrictions imposed upon such keeper, the plaintiff in error selling under a dramshop license had no right to deliver intoxicating liquors to the Express Company to be sold and delivered to places outside of the premises where his dramshop was located. This is the plain meaning of the above statute. So that under the facts of this case the plaintiff in error had no right to sell liquor at his place of business in Kansas City, Missouri, under and by virtue of the provisions of Section 7220 aforesaid, because he was not shipping it direct from the distillery, *i. e.* the place where it was made. It was all shipped from his place of business in Kansas City, Missouri. He therefore had no right to sell liquor in one gallon quantities under and by virtue of the terms of Section 7220.

Section 11640, Revised Statutes of Missouri, 1909, provides that a merchant may take out a license to sell liquors in quantities not less than five gallons. Plaintiff in error was not selling under the provisions of this statute and the only other provision relating to the sale of intoxicating liquors in the State of Missouri in less than three gallon quantities was under Section 7186, Revised Statutes, 1909, which defined a dramshop keeper as a person permitted to sell intoxicating liquors in any quantity, either at retail or in original package, not exceeding ten gallons. But defendant in

error contends that under this section the liquor must be sold and delivered to the purchaser on the premises. Plaintiff in error could not deliver these packages to the Express Company, his agent, and have it transport such liquors to another state and there deliver them, under and by virtue of the statute licensing him as a dramshop keeper. There is no evidence in this case that plaintiff had a license to sell liquors as a dramshop keeper, but, if he had, the sale of intoxicating liquors under this C. O. D. system was an evasion of the laws of the State of Missouri and never was contemplated by the legislature when it passed said act, defining a dramshop keeper.

That the sale of intoxicating liquors, C. O. D. was an evil that needed suppression is manifest by the Act of Congress, 1909.

The defendant in error therefore contends that this record shows that the C. O. D. business of selling intoxicating liquors was an evil which had grown up with and attached itself to the transportation of liquors in such commerce, and that while Congress could at any time take possession of the whole field, as it did by the Act of March 4, 1909, yet until it did so the states were left free to pass such legislation as they deemed wise in the exercise of police power to suppress such evil. Northern Pac. Ry. Co. v Washington, 222 U. S. 370. It is clear from an inspection of the Texas Statute and the Act of Congress of 1909, that they both were aimed at the same evil. Neither act prohibited the transportation of intoxicating liquors from one state into the other. This record shows that the Express Company offered to make deliveries of these intoxicating liquors to the consignees at the places of destination if the plaintiff in error would waive the collection of the C. O. D. charges. This the plaintiff in error would not do and we submit that that was as far as the Wilson Act protected these shipments. The Wilson Act does not require the carrier to act as agent for the plaintiff in collecting charges for the purchase price of liquors shipped, and the Act of Congress of 1909 recognizes the right to *transport* intoxicating liquors under the Wilson Act with just the same protection after such Act took effect as such shipments were protected before the passage of said Act.

Hence Congress did not intend to prohibit the legitimate sale and transportation of intoxicating liquors provided for and contemplated by said Wilson Act. If it had intended to limit the scope of the Wilson Act or to change its meaning in any respect, it would

have said so in this Act of 1909, but it made no modification and put no restrictions upon the provisions of the Wilson Act.

Hence it is fair to conclude that the intention of Congress in passing the Act of 1909 was simply to prohibit an evil which had grown up with and attached itself to interstate commerce, but that Congress did not intend to curtail or restrict in any way the transportation and sale of intoxicating liquors as provided for in the Wilson Act. It simply aimed at stopping Express Companies as common carriers from acting as agent in the collection of C. O. D. charges.

We therefore contend that plaintiff in error was violating the spirit and intent of both the laws of Missouri and Texas in the way he was shipping liquor in one gallon packages to all persons who ordered same, regardless of whether they were habitual drunkards, minors or insane persons and such evasion was not protected by the Wilson Act or the Interstate Commerce Act.

The case of *State of Missouri* v. *Rosenberger*, is not in point, for in that case the record does not show that plaintiff in error was engaged in manufacturing liquor at Liberty, Missouri. If he was manufacturing liquor in Kansas City he could then sell it at his place where made in one gallon packages under Section 7220 aforesaid. But his own testimony shows his distillery was located at Liberty, Mo., and therefore, he had no authority under such distiller's license, to sell liquors in one gallon quantities from his place of business in Kansas City.

IV.

The record in this case discloses many of these shipments had been made almost a month prior to the 12th day of February, 1907. Some of the shipments in question were made as early as January 12, 1907, and each of said packages was forwarded by defendant to its destination in the State of Texas and arrived there in the due course of transportation without undue delay and it was the usual and regular course of the business of defendant express company at all times herein mentioned to send written notices, properly stamped and addressed, to all consignees of express matter consigned to them. A great majority of these shipments were made to small towns in the State of Texas, which towns are set out in the petition in this case, but are not copied in this record. Some of these shipments remained in the express office almost thirty days

after arrival at destination and had not been called for by the consignees up to the time this statute went into effect. The Supreme Court of Missouri in passing upon the questions involved used this language:

> "Under this view of the case I am not able to see from what possible view point it could be considered that the question (1) of withholding the delivery of articles of commerce transported by the carrier; (2) the storage of the same until such time (not the reasonable time of their delivery) as the consignee is willing and able to pay for them and the collection of the purchase price thereof from the latter, has to do with either state or interstate commerce."

While it is true that this court has held that the term "transportation" as defined by Congress includes delivery, yet how long the carrier may hold property awaiting delivery to the consignee has never been determined as far as we are aware.

In the case of *Heymann* v. *Southern Railway Co.*, 203 U. S. l. c. 276, this court used the following language:

> "Of course, we are not called upon in this case and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrived at the point of destination and after notice and full opportunity to receive them are designedly left in the hands of the carrier for an unreasonable time that such conduct on the part of the consignee might not justify if affirmatively alleged and proven the holding of the goods so dealt with which come under the obligation of the Wilson Act, because constructively delivered."

The contract under which these shipments moved provided that the goods should be held for a period of thirty days, and upon the request of shipper may be held for another period of thiry days (Transcript of Record, p. 22).

The Supreme Court of Missouri in passing upon the record in this case, used this language:

> "And no fair minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof, and in order to meet this evil the statute of 1907 was by the legislature of that state enacted and not for the purpose of interfering with state or interstate commerce."

We submit that this innovation of selling intoxicating liquors in gallon quantities and transporting same C. O. D. in interstate commerce was not intended to be protected by Congress in passing the acts hereinbefore mentioned. Such sales of intoxicating liquors remove all state restrictions regulating or prohibiting the sale of intoxicating liquors to minors, drunkards, insane and dangerous individuals, and the practice of permitting liquor to be shipped C. O. D. to a consignee in a small town or city under an agreement that it is to be held 30 or 60 days for the consignee to call and get the same regardless of whether such time was reasonable or unreasonable is unwarranted and not intended to be protected by the Wilson Act. That act contemplated, as intimated by this court in the Heyman case, *supra*, that the consignee should call within a reasonable time and remove such intoxicating liquors and if he did not do so then the state laws would apply. Hence we contend that the contract in this case which provided that the defendant in error in this case should hold these shipments for a period of 30 or 60 days for the purpose of collecting the C. O. D. charges, was violative of the spirit and intent of the Wilson Act and was such an abuse of that act that the State of Texas had the right in the exercise of its police power to prohibit such course of business so long as Congress did not legislate upon the same subject. Congress having legislated upon that subject in 1909, the Act of Texas could not apply thereafter, but we contend that it was a proper exercise of the police power in the absence of Congressional legislation and that the act could apply and did apply until the taking effect of the Act of Congress of 1909, and that the state statute was not an unwarranted regulation of interstate commerce which rendered the statute obnoxious to the powers of Congress on that subject.

V.

We submit that this case should be affirmed upon the second ground mentioned in the opinion of the Supreme Court, to-wit, that an action for conversion of these liquors shipped C. O. D. could not be maintained, but that if plaintiff in error had any remedy it was an action upon the contract for refusing to collect the purchase price. If we are right in our contention that the substance of the sale of intoxicating liquors in this case was the agreement to sell and its acceptance, and that transportation of such liquor only included the duties enjoined upon the defendant

in error by Section 1 of the interstate commerce act, and if there was no duty enjoined by law upon the defendant in error to collect the purchase price of the goods carried unless it contracted to do so, then a breach of the contractual obligation at best would only afford an action for damages for failure to perform such part of the contract. A violation of the duties which the law enjoins upon the defendant in error, creates an obligation different from the obligation created by the contract, and a breach of the contractual duty is a violation of the contract for which the law provides a different remedy, from the remedy provided for a breach of the obligation imposed by law. Hence, if plaintiff has any right of action at all it is a right of action for damages for the failure to collect the purchase price of these goods. The record shows that the defendant in error offered to hold these goods at the point of destination until plaintiff could make arrangements through banks or otherwise to collect the purchase price. This, plaintiff in error refused to do. If he had any right of action at all for violation of this contractual duty it was an action for damages and not an action for conversion of the property. Hence we contend that the judgment of the Supreme Court of the State of Missouri can be sustained upon a non-federal ground, and for that reason alone, if no other, the judgment should be affirmed. Under the well known rule of this court, that where a judgment rests equally upon either federal ground or a non-federal ground, this court will affirm the judgment.

We therefore respectfully submit that the Supreme Court of the State of Missouri did not err in holding that the statutes of the State of Texas lawfully applied to an agent collecting the purchase price of the liquor shipped C. O. D., and that the duty to collect the purchase price of liquor shipped C. O. D. was not an obligation imposed by law but one assumed by contract, and that a violation of such obligation so assumed by contract at best afforded only an action for damages and did not support an action for conversion, and hence the decision of the Supreme Court of the State of Missouri should be affirmed on both grounds.

Respectfully submitted,

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Attorneys for Defendant in Error.

ROSENBERGER *v.* PACIFIC EXPRESS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 249. Argued March 8, 1916.—Decided April 24, 1916.

Speaking generally the States are without power to directly burden an interstate shipment until after its arrival and delivery and sale in original package; and this rule applies to the movement of intoxicating liquor as to other commodities.

The Wilson Act only modifies this rule as to shipment of intoxicating liquors so as to bring them under state control after delivery, but before sale, in the original package.

The power to make interstate commerce shipments C. O. D. is incidental to right to make the shipment, and an attempt by the State to prohibit contracts to that effect or prevent fulfillment thereof is, as a burden upon, and an interference with, interstate commerce, repugnant to the Federal Constitution.

The interstate commerce which is subject to the control of Congress embraces the widest freedom including the right to make all contracts having a proper relation to the subject.

The power of the State to control interstate C. O. D. shipments prior to the enactment of the United States Penal Code cannot be deduced from the enactment of § 239 of that Code prohibiting them.

Since the enactment, and by virtue of the Wilson Act and the remedial authority thereby conferred by Congress on the States to regulate sales of liquor after arrival in the State and before sale in the original packages, a State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Delamater* v. *South Dakota*, 205 U. S. 93.

The statute of 1907 of Texas imposing special licenses on Express Companies maintaining offices for C. O. D. shipments of intoxicating liquors is an unconstitutional burden on and interference with interstate commerce and does not justify an Express Company accepting such a shipment from refusing to deliver the same; and in this case *held* that such refusal amounted to conversion of the goods.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of the

statute of the State of Texas imposing licenses on places of business of Express Companies where intoxicating liquors are delivered C. O. D., are stated in the opinion.

Mr. J. J. Vineyard and *Mr. A. F. Smith*, with whom *Mr. Frank F. Rozzelle* was on the brief, for plaintiff in error.

Mr. I. N. Watson, with whom *Mr. J. L. Minnis* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On the taking effect in Texas on the twelfth day of February, 1907, of a law imposing a state license tax of $5,000 annually on each place of business or agency of every express company where intoxicating liquors were delivered and the price collected on C. O. D. shipments, and by which law one-half of the amount of the state license was in addition authorized to be imposed by every county or municipality, the Express Company, the defendant in error, discontinued at all its agencies in Texas all such business. As a result the Company sent back to Kansas City, Missouri, the packages of intoxicating liquor which it had received under C. O. D. shipments made to various places in Texas from Kansas City by Rosenberger, the plaintiff in error, and tendered them to him conditioned on his payment of the return carriage charges. Rosenberger refused to accept the offer and brought this suit to recover the value of the merchandise on the ground that the failure to carry out the shipments was a conversion. The trial court holding the Texas act was repugnant to the commerce clause of the Constitution of the United States and afforded no justification to the Express Company for refusing to carry out the shipments, awarded the relief sought. And the object of this writ of error is to obtain a reversal of a final judgment of the court below reversing

the trial court and rejecting the claim on the ground that the Texas license law was not repugnant to the commerce clause and afforded ample authority to the Express Company for refusing to complete the interstate shipments in question. 258 Missouri, 97.

Passing minor contentions whose want of merit will be hereafter demonstrated, it is clear that the issue is this: Was the state license law if applied to C. O. D. interstate commerce shipments repugnant to the commerce clause of the Constitution? It is certain that this question, in view of the date of the law and of the shipments involved, must be determined in the light of the operation of the commerce clause as affected by the power conferred upon the States by what is usually known as the Wilson Law (Act of August 8, 1890, c. 728, 26 Stat. 313), and wholly unaffected by § 239 of the Penal Code enacted by Congress March 4, 1909, prohibiting the shipment of intoxicating liquors under C. O. D. contracts, and also without reference to the act of Congress known as the Webb-Kenyon Law of March 1, 1913 (c. 90, 37 Stat. 699).

Thus limited, as it is not controverted and indeed is indisputable that the provisions of the statute placed a direct burden on the shipments with which it dealt and in fact were prohibitive of such shipments, it follows that error was committed in holding that the statute was not repugnant to the Constitution of the United States in so far as it applied to interstate C. O. D. shipments for the following reasons: (a) Because it is settled from the beginning and too elementary to require anything but statement that speaking generally the States are without power to directly burden interstate commerce and that commodities moving in such commerce only become subject to the control of the States or to the power on their part to directly burden after the termination of the interstate movement, that is, after the arrival and delivery of the commodities and their sale in the original packages, and that this rule is

as applicable to the movement of intoxicating liquors as to any other commodities. (b) Because the Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would, that is, after delivery but before sale in the original packages. (c) Because the power in interstate commerce shipments to make C. O. D. agreements, that is, agreements on delivery of the commodity shipped to collect and remit the price, is incidental to the right to make such shipments and the commodities when so shipped do not come under the authority of the State to which the commodities are shipped under such agreements until arrival and delivery, and therefore any attempt on the part of the State to directly burden or prohibit such contracts or prevent the fulfillment of the same necessarily comes within the general rule and is repugnant to the Constitution of the United States.

These propositions in substance have been by necessary implication or by direct decision so authoritatively and repeatedly determined as shown by the cases cited in the margin,[1] that there is no necessity for going further. But in view of the fact that the court below held the statute to be not repugnant to the commerce clause not because it overlooked the rulings of this court referred to but because it considered them distinguishable or inapposite to this case for reasons deemed by it to be conclusive, there being some difference of opinion on the subject in the court below, we briefly refer to those reasons.

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[1] *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438; *Heyman* v. *Southern Railway*, 203 U. S. 270; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218; *Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Rossi* v. *Pennsylvania*, 238 U. S. 62; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129.

It was said that the shipment of commodities contains two elements, one the obligation arising from the duty of the carrier to receive and carry without express contract, and the other such obligation as arises from contracts made concerning the shipment not embraced in the duty which rested by law upon the carrier in the absence of contract, the latter being illustrated by C. O. D. contracts. These two classes of obligations, it was pointed out, arising from different sources, were controlled by a consideration of the source whence they sprang, the one, the duty independent of contract, being commerce, and the other, the duty depending upon express contract in a sense independent of commerce, being governed by the law controlling contracts; that is to say, the one being controlled by the commerce clause and the other by the law of the State. And from these generalizations it was concluded that however complete and efficacious was the control of the Constitution of the United States over the obligation resulting from shipments in the proper sense, it was clear that the power of the State was complete over the other class of obligations, those arising from distinct contracts, and hence the act imposing the burden on the contract to collect on delivery did not reach over into the domain of shipment, was independent of the same, and therefore was not repugnant to the commerce clause. But we think it is a sufficient answer to say that the reasoning referred to rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning and as enforced in a line of decisions of this court beginning with the very birth of the Constitution and which in its fundamental aspect has undergone no change or suffered no deviation: that is, that the interstate commerce which is subject to the control of Congress embraces the widest freedom, including as a matter of course the right to make all contracts having a proper relation to the subject. Indeed, it must be at once apparent that if

the reasoning we are considering were to be entertained, the plenary power of Congress to legislate as to interstate commerce would be at an end and the limitations preventing state legislation directly burdening interstate commerce would no longer obtain and the freedom of interstate commerce which has been enjoyed by all the States would disappear. But to state these general considerations is indeed superfluous since in one of the previous cases which we have cited (*American Express Co.* v. *Iowa*, 196 U. S. 133, 143, 144) substantially the identical contention which we have just disposed of was relied upon and its unsoundness was expressly pointed out and the destructive consequences which would arise from its adoption stated.

The minor contentions to which we previously referred are these:

1. That although it be that § 239 of the Penal Code has no retroactive operation, it should be used as an instrument of interpretation from which to deduce the conclusion that the power of a State to prohibit shipments of intoxicating liquors in interstate commerce under C. O. D. contracts existed at the time here in question. But this by indirection simply seeks to cause the Act of Congress to retroactively apply by reasoning which if acceded to would require it to be said that all the previous decisions of this court dealing with the subject before the Penal Code was enacted were wrong and that in addition the enactment of § 239 was wholly unnecessary.

2. That even although there was a wrongful refusal of the Express Company to carry out the shipments its doing so was a mere violation of contract, giving a right to sue in damages but not for conversion. We see nothing in the record to indicate that this contention was urged in the trial court or in the court below. But passing this consideration, in view of our previous action rejecting a motion to dismiss, the question is foreclosed. But again

even if this be put out of view, the proposition is without merit under the controlling state law. *Rice* v. *Indianapolis & St. Louis R. R.*, 3 Mo. App. 27; *Loeffler* v. *Keokuk Packet Co.*, 7 Mo. App. 185; *Danciger Bros.* v. *American Express Co.*, 172 Mo. App. 391.

3. That this case is taken out of the settled rule to which we have referred and is controlled by the ruling in *Delamater* v. *South Dakota*, 205 U. S. 93. But the proposition presupposes that the decision in that case overruled the many decisions sustaining the rule without the slightest indication of a purpose to do so. It proceeds upon an obvious misconception of the *Delamater Case* which instead of disregarding the construction put upon the Wilson Act and the many cases dealing with the subject, was on the contrary but an application in a new form of the additional power which that act gave. In other words the case but held that inasmuch as Congress by virtue of its regulating authority had caused shipments of intoxicating liquors in interstate commerce to become subject to state authority after arrival and before sale in the original packages, the exertion by the State of its authority to prevent the carrying on in the State of the business of soliciting purchases of liquor to be shipped from other States was lawful as a mere exertion of police power not constituting a direct burden upon interstate commerce, since such a regulation was within the scope of the remedial authority conferred by Congress by virtue of the Wilson Act.

And the contention just stated leads to a reference to suggestions which we deem to be wholly irrelevant to the issue for decision made both in the opinion of the court below and in the argument at bar concerning possible abuses committed as the result of C. O. D. shipments of intoxicating liquors into States where the use of such liquor is prohibited, such as the unreasonable detention of such liquors before delivery, the ultimate delivery to a

person who had not ordered the same, the transfer to others by the ostensible person to whom the shipment was seemingly made, etc., etc. We say irrelevant suggestions because we are considering here not whether a state statute enacting reasonable regulations to prevent abuses under C. O. D. shipments would be a direct burden upon interstate commerce, but are only called upon to determine whether a statute is repugnant to the commerce clause which expressly asserts the power of the State to forbid all C. O. D. interstate commerce shipments of intoxicating liquors without reference to abuse of any kind or nature in the manner in which said contracts are carried out.

It follows from what we have said that the court below erred and that its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.